

IN RE ATTORNEY FEES REQUEST OF
GOSTA E. DAGG

IBIA 83-19-A

Decided January 23, 1984

Petition for attorney fees filed by counsel for prevailing party in Estate of Helen Ward Willey, 11 IBIA 43 (1983).

Petition granted.

1. Indian Probate: Attorneys at Law: Fees

Under 43 CFR 4.281, an Administrative Law Judge or the Board of Indian Appeals is an authorized representative of the Secretary within the meaning of 25 CFR 115.9 to approve the disbursement of trust funds from an Individual Indian Money account for the payment of attorney fees arising from representation of an Indian client in a Departmental probate proceeding.

APPEARANCES: Gosta E. Dagg, Esq., Everett, Washington, pro se; Tim Vollman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Indian Affairs. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On February 22, 1983, the Board of Indian Appeals (Board) received a petition for attorney fees from Gosta E. Dagg, Esq. (petitioner), Everett, Washington. Petitioner seeks an award of fees and allowable costs for his successful representation of Charles Williams in Estate of Helen Ward Willey, 11 IBIA 43 (1983). ^{1/}

In support of his petition, petitioner presents a contingency fee agreement between himself and Charles Williams, dated February 1, 1980. In general, the contract provides for payment of a contingent fee of 33-1/3 percent of the value of property which Williams might receive as a result of litigation of the above estate. This fee was to be paid directly from decedent Willey's Individual Indian Money (IIM) account. The BIA did not approve the contract in advance of petitioner's representation of Charles Williams or of the filing of the present petition.

Petitioner seeks to enforce this fee agreement "as a cost of administration [of Helen Ward Willey's estate] or [as a charge against] the interest of Charles Williams" (Petition at 1). Petitioner therefore asks that this fee "be paid directly from the IIM account of the Estate of Helen Ward Willey at the Olympic Peninsula Agency of the B.I.A." Id. Alternatively, as outlined in an April 26, 1983, amendment to the petition, petitioner seeks payment for services rendered on the basis of an itemized schedule.

^{1/} In Willey, Charles Williams was found to be entitled to receive all property held by the Bureau of Indian Affairs (BIA) in trust for decedent Willey.

Under 43 CFR 4.281, attorney fees may be allowed in Indian probate cases either against the interest of the person represented or as a cost of administering the estate. In this case, the difference is perhaps academic because the person represented received the entire estate. However, an attorney should look first to the client for payment. The Board will, therefore, consider whether the present contingency fee agreement is properly chargeable against IIM account funds held for or due to Charles Williams. 2/

Departmental regulations concerning IIM accounts are set forth in 25 CFR Part 115. Specifically, section 115.9 provides that BIA may disburse funds from an IIM account to cover "contractual arrangements approved in advance by the Secretary or his authorized representative." Petitioner argues, and BIA agrees, that this regulation should not be construed to require, in all instances, Secretarial approval of a contract when it is executed. Instead, the parties maintain that approval can be given at any time before payment from trust funds is made under the contract.

Cf. Wishkeno v. Deputy Assistant

2/ The Board considered the question of payment of general creditors' claims from trust funds of an estate in Estate of John Joseph Kipp, 8 IBIA 30, 87 I.D. 98, reconsideration denied, 8 IBIA 67 (1980). The dissent in Kipp reviews the development of the Departmental regulations allowing creditors' claims against decedents' estates, and suggests that the only allowable claims are ones that were approved by the Secretary during the decedent's lifetime. In responding to this dissent, the majority noted that payment of such claims had been permitted by Departmental regulation for many years, and "[t]o the extent that Indians exist daily on lines of credit furnished them by grocers, doctors, and other life-blood creditors, it is difficult to perceive the good of a rule which would either deny them this lifestyle or seriously impair it through some form of 'Departmental approval' requirement." 8 IBIA at 39 n.8, 87 I.D. at 103 n.8.

Because the Board has determined that any award of fees should be made from the interests inherited by Charles Williams, the propriety of an award against the estate is not raised. Here, the specific question is whether payment for services rendered to a person still living, in connection with the probate of an estate, should be made from funds held in trust for his benefit.

Secretary--Indian Affairs (Operations), 11 IBIA 70 (1983) (retroactively approving a deed of Indian trust land). The Board agrees.

[1] Petitioner further argues that 43 CFR 4.281 makes Administrative Law Judges and the Board authorized representatives of the Secretary for the purpose of considering and awarding, if appropriate, attorney fees for representation of Indians in Indian probate proceedings. The Board again agrees. Therefore, the approval of an attorney fee agreement by an Administrative Law Judge or the Board constitutes the requisite approval required by 25 CFR 115.9 for disbursement of trust funds from an IIM account. 3/

Section 4.281 states: "In determining attorney fees, consideration shall be given to the fact that the property of the decedent is restricted or held in trust and that it is the duty of the Department to protect the rights of all parties in interest." In this case, the contingency fee agreement, at paragraph 2, provides for the payment of

33 1/3% of all monies in trust or otherwise at the time the funds are legally able to be distributed to Client [Charles Williams] and 1/3 of any funds recovered from Reginald Willey and Georgianna Straight. [4/] The 1/3 fee shall be limited to those amounts then in the trust fund except for the funds realized or to be realized from (1) Reginald Willey and Georgianna Straight and from (2) Quinault allotment No. 101 (Walter Major);

3/ This finding does not prevent an attorney from seeking approval of an attorney fee contract by BIA before representing an Indian client. In fact, the Board encourages such prior approval. In Estate of Howard Good Elk or Pacer, 9 IBIA 38 (1981), cited by petitioner as precedent for the Board's allowing an award of attorney fees in an Indian probate case, counsel submitted such an attorney fee agreement approved by the Agency Superintendent for the Secretary when the contract was executed.

4/ The original probate decision had disapproved decedent Willey's will and had found that her heirs at law were Reginald Willey and Georgianna Straight. Petitioner states that approximately \$62,000 had been distributed to these individuals before the filing of Charles Williams' petition for reopening.

i.e. the 1/3 shall specifically, also, apply to the funds whenever received from the Walter Major allotment from the sale of currently standing timber.

Giving due consideration to its trust responsibilities, the Board cannot approve this contract in its entirety. First, representation of Charles Williams in an attempt to recover funds disbursed by BIA to Reginald Willey and Georgianna Straight under the original probate decision goes beyond representation of Williams in a probate proceeding under the jurisdiction of the Department of the Interior. In addition, the provision for a payment to petitioner of one-third of the value of standing timber on the Walter Major allotment is potentially excessive, and incalculable at this time. 5/

The Board finds reasonable the portion of the contingency fee agreement which provides for an award based upon the funds in the estate's IIM account "at the time the funds are legally able to be distributed to" Williams. Petitioner took an apparently hopeless case and brought it to a successful conclusion for his client on a contingency fee basis, taking a full share of the risk that he might be unsuccessful. The estate accruing to Charles Williams is estimated to be in excess of \$200,000 (see Brief at 3) although only about \$32,000 was in the IIM account at the time of the Board's decision. Considering the time required, the complexity of the case, and the size of the estate involved, 6/ the Board finds that an attorney fee of one-third of the amount

5/ In a Dec. 8, 1983, letter to the Board, received on Dec. 19, 1983, petitioner abandoned that part of his petition seeking any award based on the value of trust real property.

6/ For a list of other factors to be considered in determining the reasonableness of attorney fees, see "Model Rules of Professional Conduct," Rule 1.5(a), as adopted by the House of Delegates of the American Bar Association on Aug. 3, 1983.

in decedent's IIM account is reasonable. 7/ The amount to be used in calculating petitioner's fee shall include only those funds that were in the estate's IIM account on January 31, 1983, the date of the Board's decision finding Williams entitled to the estate, and shall not include any funds accruing to the estate since January 31, 1983, but held in the account under the Board's March 25, 1983, order staying distribution. In addition to this attorney fee, costs in the amount of \$227.55 are to be allowed. 8/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board approves that part of the contingency fee agreement between petitioner and Williams that has been described. This matter is referred to BIA for a determination of the amount of the fee in accordance with this decision. This fee should be paid to petitioner from the IIM account of the estate of Helen Ward Willey. Upon

7/ The Board's willingness to accept a 33-1/3 percent award in this case should not be construed by the bar as setting a standard for such awards in future cases. The Board has a greater responsibility to the Indian community than to accept any predetermined percentage of the ultimate award as appropriate without very careful scrutiny. In particular, when the attorney-client contract has not received prior BIA approval, the amount requested as compensation in each contingent fee case must be weighed against the appropriate hourly rate for the type of work being undertaken, determined partly in light of the prevailing scale in the particular community, and with due consideration to whatever minimum amount may appear appropriate because of the contingent nature of the compensation. Therefore, each request for attorney fees that comes before this Board must be justified on its own merits.

8/ Petitioner alternatively sought recovery of \$10,615 based on an itemized schedule of time expended on this case from Feb. 1, 1980, through Feb. 15, 1983. This amount appears to represent a fee of \$110 per hour. Notwithstanding the possibility that the fee so arrived at may be less than that allowed by this opinion, petitioner presents no evidence that this rate was agreed to by Williams, that it is the customary rate in the community, or that it is otherwise reasonable. There is also no explanation for a flat rate rather than a varying rate depending upon the nature of the work involved; for example, different rates for time spent in the office and before the Administrative Law Judge. In order to approve an award based upon such an itemized schedule, the petition should be presented first to the Administrative Law Judge who heard the case for a determination of the reasonableness of the fee in relation to the observed performance.

payment of this claim, the March 25, 1983, stay on distribution of the estate of Helen Ward Willey is lifted, and the remainder of the estate may be distributed in accordance with customary BIA procedures.

Franklin D. Arness
Administrative Judge

We concur:

Jerry Muskrat
Administrative Judge

Bernard V. Parrette
Chief Administrative Judge